

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

RAYNALDO MARTOS,)	
)	
Claimant,)	
)	
v.)	IC 2003-503625
)	
LARIAT PRODUCTIONS, INC.,)	
)	
Employer,)	FINDINGS OF FACT,
)	CONCLUSION OF LAW,
and)	AND RECOMMENDATION
)	
STATE INSURANCE FUND,)	Filed: October 3, 2008
)	
Surety,)	
Defendants.)	
)	

INTRODUCTION

Pursuant to Idaho Code § 72-506, the Idaho Industrial Commission assigned the above-entitled matter to Referee Rinda Just. D. Scott Summer of Caldwell represented Claimant. Alan K. Hull of Boise represented Defendants. Pursuant to agreement by the parties, the matter was to be submitted on the briefs and exhibits. A concurrent briefing schedule was issued, and then subsequently modified by the Referee at the request of Claimant. Claimant failed to file his brief on the date due, and pursuant to a motion filed by Defendants, Claimant's brief, together with attached exhibits, was struck from the record. Defendants' brief and exhibits were timely filed, and represent the only evidence before the Referee in this proceeding. The matter came under advisement on August 5, 2008, and is now ready for decision.

ISSUE

By agreement of the parties at a status conference conducted June 13, 2008, the sole issue

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to be determined in this proceeding is:

1. Whether the “Litigation and Cost Sharing Agreement” (Agreement), entered into by the parties on or about February 14, 2005, controls the allocation of proceeds from the third-party recovery.

CONTENTIONS OF THE PARTIES

Absent briefing from Claimant, the Referee was able to glean only limited information on Claimant’s position from the legal file and Defendants’ briefing. Simply stated, Claimant seeks to withhold from Surety all or a portion of the proceeds from a third-party settlement that Surety would otherwise be entitled to receive pursuant to the February 2005 Agreement. Claimant’s basis for withholding Surety’s share of the proceeds concerns an unadjudicated allegation that Employer was negligent, and such negligence should either reduce or preclude Surety’s recovery under the Agreement.

Defendants assert that they entered into an agreement with Claimant to pursue a tort claim against Tate’s Rents, a third-party tortfeasor (Tate). Negotiations took some sixteen months, and ultimately resulted in the subject Agreement. Working together, Claimant and Defendants were able to obtain a settlement from Tate. Surety argues that it is entitled to its share of the proceeds of the settlement pursuant to the Agreement. Surety’s argument is based on general contract principles, *i.e.*, that it entered into a contract whose terms were clear and unambiguous and which represented the final intent of the parties with respect to division of any third-party proceeds. The Agreement is not subject to interpretation, and Surety is entitled to the benefits for which it negotiated and to which Claimant agreed.

EVIDENCE CONSIDERED

The record in this matter consists of the following:

1. The Affidavit of Chris Hansen, together with the February 2005 Agreement, identified as Exhibit 1;
2. Defendant's Memorandum in Support of Enforcement of Litigation and Cost Sharing Agreement;
3. The Commission's legal file; and
4. Official records of the Idaho Industrial Commission, of which the Referee takes judicial notice.

After having considered all the above evidence, the Referee submits the following findings of fact and conclusion of law for review by the Commission.

FINDINGS OF FACT

PROCEDURAL BACKGROUND

1. Claimant was injured on February 19, 2003, when he was struck by equipment that was part of a forklift owned by Tate and leased to Employer. Claimant sustained injuries to both legs, one eye, his right wrist, his skull (including a closed head injury), along with his nose, ribs, and one shoulder.
2. Surety accepted Claimant's workers' compensation claim and paid for medical care, income benefits, and permanent partial impairment. Surety paid \$228,000 in benefits over the duration of the claim.
3. On September 26, 2003, Claimant advised Surety that he had retained private counsel (Christ T. Troupis) to represent his interests in both his workers' compensation claim and a third-party liability claim against Tate.
4. Troupis and counsel for Surety contemplated entering into an agreement setting forth the manner in which litigation costs and attorney fees for the third-party litigation would be

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advanced and/or paid by the parties, reimbursed to the parties, and how the remaining recovery balance, if any, would be divided. Troupis provided the first draft of an agreement to Surety on October 14, 2003.

5. Between October 14, 2003 and February 10, 2005, counsel exchanged correspondence and engaged in numerous telephone conversations regarding revision and finalization of the proposed agreement. Also during this period, Troupis filed a civil complaint against Tate, asserting, among other issues, strict liability and negligence on the part of Tate.

6. Troupis executed the final Agreement on February 10, 2005. Surety's counsel executed the Agreement on February 14, 2005.

7. Subsequent to signing the Agreement, Troupis filed a Notice of Substitution of Counsel, substituting Gilbert L. Nelson for Christ T. Troupis.

THE AGREEMENT

8. Paragraph 1 of the Agreement provides that each party will retain their own attorney (Troupis and Hull) who will work together in pursuit of recovery from Tate or other third-party tortfeasors.

9. Paragraph 2 provides that each party will pay and/or advance one-half of the reasonable and necessary costs of the litigation (photocopies, filing fees, service costs, deposition transcript costs, etc.).

10. Paragraph 3 of the Agreement sets out the methodology for repayment of costs advanced by the parties, and division of the remainder of any award or settlement that the parties might obtain as a result of their joint efforts. The proceeds of any third-party funds obtained would first be used to repay the advances and/or costs incurred by the parties in pursuing the third-party claim.

11. Paragraph 3(a) divides the proceeds remaining after payment of costs equally, with fifty percent to Claimant and fifty percent to Surety up to the amount of Surety's subrogation claim (\$228,000.00).

12. Paragraph 3(b) makes it clear that attorney fees earned and owing to Troupis pursuant to his fee agreement with Claimant would be paid *only* from Claimant's 50% share. Similarly, attorney fees earned and owing to Hull pursuant to his fee agreement with Surety would be paid *only* from Surety's 50% share.

13. Paragraph 3(c) addresses the possibility that Surety's 50% share of a third-party recovery might exceed their subrogation claim, and provides that in the event Surety's subrogation claim (\$228,000.00) was fully satisfied with less than Surety's 50% share, any excess was to be paid to Claimant.

14. Paragraph 3(d) is essentially a restatement of Paragraph 3(b), and provides that attorney fees owed to Surety's attorneys will be paid from Surety's share of the proceeds and pursuant to the fee agreement between Surety and its attorneys, while attorney fees owed to Claimant's attorney will be paid from Claimant's share of the proceeds and pursuant to the fee agreement between Claimant and his attorney.

15. Paragraph 3(e) provides that if no third-party recovery is obtained, then neither party would be reimbursed for costs that were paid or advanced, but that the costs paid or advanced would be equalized as between the parties.

16. Paragraph 4 of the Agreement once again restates the attorney fee provisions, reaffirming that Claimant will not be responsible for any attorney fees owing to Surety's counsel, nor will Surety be responsible for any attorney fees owing to Claimant's counsel. In a bit of a *non sequitur*, this paragraph also restates that the total amount recovered by Surety shall not

exceed the amount of its subrogation lien together with reimbursement for costs advanced.

17. Paragraph 5 provides that if either party should settle or determine not to pursue the third-party claim further, that party's attorney will continue to cooperate with the remaining party for the remainder of the litigation.

18. Paragraph 6 of the Agreement provides that should there be a dispute between the parties "regarding apportionment issues or the amount of the subrogation claims of [Surety]," the dispute will be submitted to the Commission for resolution. Exhibit 1, p. 4.

19. Finally, Paragraph 7 of the Agreement restates that the purpose of the Agreement:

. . . is solely to facilitate the mutual interests of [Surety] and [Claimant] to recover expenses, damages and losses from the parties responsible for causing or contributing to causing [Claimant's] injuries.

Id. The final paragraph goes on to address the nature of the attorney/client relationship as between the parties, the responsibility of each attorney to represent his own client's interests to the extent that they diverge from the other client's interest, and that neither party will act in such a manner as to deprive the other party of the benefits of the agreement.

THE DISPUTE

20. The civil action against Tate settled on November 28, 2006, for \$213,000.00. Surety executed the necessary documents, including a Release and Indemnity Agreement, to finalize and implement the settlement.

21. Claimant refused to pay over Surety's share of the proceeds of the settlement, asserting that Surety was not entitled to any subrogation recovery or to the benefit of the Agreement because Employer's negligence contributed to Claimant's injuries.

22. Claimant filed a workers' compensation complaint on January 2, 2007, asserting that Defendants were not entitled to any third-party settlement recovery or their subrogation

interest, because of offsets and apportionment of Employer's negligence.

DISCUSSION AND FURTHER FINDINGS

THE STATUTORY SCHEME

23. Over the years, both the Idaho Supreme Court and workers' compensation practitioners have grappled to harmonize the provisions of the workers' compensation laws with principles of tort where a Claimant's injuries were caused, in part, by a third-party tortfeasor.

This has been a difficult task for several reasons, including:

(1) the exclusive liability of the employer under the workmen's [sic] compensation statutes; (2) the policy against double recovery by an injured victim; (3) the policy against allowing an employer or its insurer to profit from the employer's own wrong; (4) the third party's right of contribution for the comparative negligence of others, *i.e.* the employer.

Runcorn v. Shearer Lumber Products, Inc., 107 Idaho 389, 396, 690 P.2d 324, 331 (1984).

24. The current state of Idaho law on this issue is best summarized in *Barnett v. Eagle Helicopters, Inc.*, 123 Idaho 361, 848 P.2d 419 (1993):

Idaho statutes set up a scheme whereby an injured employee may hold a third party liable in tort for damages. I.C. § 72-223. An employer who has paid compensation to the employee for the injury is subrogated to the rights of the employee to recover the amount paid from a third party. I.C. § 72-223(3). However, this Court has limited this right to subrogate in cases where the employer also has been determined to be negligent. *Liberty Mutual Ins. Co. v. Adams*, 91 Idaho 151, 155, 417 P.2d 417, 421 (1966); *Schneider v. Farmers Merchant*, 106 Idaho 241, 244, 678 P. 2d 33, 36 (1983). Idaho case law has "established a system of apportioning the employee's damages between the employer and third party" based on I.C. § 72-223 where both the employer and third party are adjudged negligent. *Schneider v. Farmers Merchant*, 106 Idaho 241, 243, 678 P. 2d 33, 35 (1983).

Barnett at 123 Idaho 363, 848 P.2d 421.

AGREEMENT

25. Two important factors distinguish the case at bar from the fact pattern in *Barnett*. The first of these factors is that before the Claimant in this proceeding filed suit against the third-party tortfeasor, the parties entered into the Agreement that is the subject of this dispute. The stated purpose of the Agreement was to resolve, at the outset, three potentially contentious issues: 1) funding the third-party suit; 2) apportioning the proceeds of the suit, if any; and 3) apportioning attorney fees. Idaho Code § 72-223(4) mandates that attorney fees in third-party liability claims be apportioned between the parties to prevent windfall recovery to non-participating parties.¹ Idaho Code § 72-223(4) can be effectuated either by agreement of the parties, as in this case, or by the terms of the statutory provision itself.

26. The Agreement that the parties executed in February 2005 is a valid and enforceable contract. Its terms are clear and unambiguous. The parties spent sixteen months negotiating its terms, so had ample opportunity to consider the import of the provisions to which they both eventually agreed. The Agreement is silent on the potential issue of contributory or comparative negligence--odd, perhaps, given the likelihood that just such an issue might surface in the context of a tort action. However, its absence has no effect on the validity of the Agreement.

EMPLOYER NEGLIGENCE

27. The second way in which the case at bar differs from *Barnett*, is that in *Barnett*, and all of the related cases cited therein, there was an actual adjudication that there had been some negligence on the part of the employer. Here, there has been no determination that

¹ The issue of attorney fees can be problematic because a third-party tort action does not require joint action of the claimant and employer/surety--any party may pursue a third-party tortfeasor. If a settlement or an award is obtained by either party individually, the non-participating party benefits from that award without having had to contribute to the cost of obtaining the recovery.

Employer was negligent—merely an allegation without any evidentiary support. Further, since any negligence on the part of Employer only serves to reduce the amount owed by Tate, and does not increase the amount Claimant receives, the time for making such a determination has long passed. In any event, the actual settlement agreement executed by Defendants, Claimant, and Tate was not offered as an exhibit in this proceeding.

AGREEMENT IS CONSISTENT WITH STATED POLICY CONSIDERATIONS

28. Enforcement of the Agreement as written results in an outcome that is consistent with all four policies set out by the Court in *Runcorn*. First, it preserves the exclusive liability of Employer. Second, it provides some compensation to Claimant for losses that are not compensable under the workers' compensation laws (pain and suffering, loss of consortium, etc.), but does not allow the Claimant double recovery on the workers' compensation claim. Third, because Surety is giving up almost half of its subrogation claim, it cannot be said that Surety is somehow benefitting from the bad behavior of Employer, assuming that there was any. The final consideration—Tate's right to contribution for Employer negligence--just cannot be addressed on these facts. First, we do not know whether Employer was negligent in any respect, but suspect that such a possibility is reflected in the relatively low settlement amount. Second, Tate has paid the settlement to Claimant and is not a party to this proceeding. Allowing Claimant to increase his recovery with a contribution to which Tate might have been entitled is speculative, unfair, constitutes double recovery for Claimant, and is contrary to the considerations set out by the Court in *Runcorn*.

29. This conclusion is easily demonstrated by comparing the outcome as Claimant would have it, as the Agreement provides, and as it would be handled in the absence of any agreement.

Under Claimant's Scenario

- Surety would take the entire \$213,000.00, less a portion of the attorney fees and costs, because their subrogation lien exceeded the amount of the settlement by \$15,000.00. If Employer had been adjudicated to have contributed to Claimant's injuries, Surety would have sustained a *proportional reduction* in the amount of its lien. Given the amount by which Surety's lien exceeded the settlement, any reduction must be equal to or greater than \$15,000 before it actually impacts Surety's lien;
- If it were to be determined that Employer bore some legal responsibility for Claimant's injuries, the reduction in the amount of Surety's lien represents a deduction from Tate's obligation, not an increase in Claimant's award. Allowing Claimant to retain such funds results in double recovery by the Claimant;
- Claimant's attorney would recover his fees;
- Claimant would take nothing.

Under the Agreement

- Both Claimant and Surety recover their one-half of the costs that were advanced to conduct the litigation ($\text{costs} \div 2$);
- Surety recovers half of the amount remaining from the settlement after costs—far less than their \$228,000.00 lien ($((\$213,000 - \text{costs}) \div 2)$), foregoing in excess of \$121,500;
- Claimant recovers half of the amount remaining from the settlement after costs ($((\$213,000 - \text{costs}) \div 2)$), and receives some amount less than \$106,500.00;
- Counsel for Defendants is paid pursuant to his agreement, with the remainder

retained by Surety;

- Counsel for Claimant is paid pursuant to his agreement, with the remainder retained by Claimant.

Pursuant to Statute in Absence of an Agreement

- Surety receives \$213,000.00 less its proportionate share of costs and fees as determined by the Commission;
- Claimant's counsel receives his proportionate share of costs and fees as determined by the Commission;
- Claimant takes nothing.

CONCLUSION

30. Claimant instigated this proceeding by filing a workers' compensation complaint in which he sought to negate the terms of the Agreement which he negotiated and willingly signed. Thereafter, Claimant offered no evidence or argument in support of his position that he is entitled to retain settlement funds due and owing Surety under the Agreement. Claimant has asserted, but not proved, that Employer's negligence contributed to his injuries. Were the issue to be adjudicated, and Claimant prevail, Surety's subrogation lien could be reduced—but to the benefit of Tate, not Claimant. However, the issue of Employer's alleged negligence was not adjudicated—Tate offered a settlement that was acceptable to both Claimant and Surety.

In any event, Claimant has failed to establish that there is any basis in law or in equity to disregard the terms of the Agreement. Claimant's actions in this proceeding beggar belief, especially in light of the fact that under the Agreement, Claimant may actually walk away with some compensation that he would not be entitled to receive under any other circumstance.

CONCLUSION OF LAW

1. The Litigation and Cost Sharing Agreement (Agreement) entered into by the parties on or about February 14, 2005, controls the allocation of proceeds from the third-party recovery.

RECOMMENDATION

Based upon the foregoing Findings of Fact, Conclusion of Law, and Recommendation, the Referee recommends that the Commission adopt such findings and conclusion as its own and issue an appropriate final order.

DATED this 24 day of September, 2008.

INDUSTRIAL COMMISSION

/s/_____
Rinda Just, Referee

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

RAYNALDO MARTOS,)	
)	
Claimant,)	
)	
v.)	IC 2003-503625
)	
LARIAT PRODUCTIONS, INC.,)	
)	
Employer,)	ORDER
)	
and)	Filed: October 3, 2008
)	
STATE INSURANCE FUND,)	
)	
Surety,)	
Defendants.)	
)	

Pursuant to Idaho Code § 72-717, Referee Rinda Just submitted the record in the above-entitled matter, together with her proposed findings of fact and conclusion of law, to the members of the Idaho Industrial Commission for their review. Each of the undersigned Commissioners has reviewed the record and the recommendation of the Referee. The Commission concurs with this recommendation. Therefore, the Commission approves, confirms, and adopts the Referee's proposed findings of fact and conclusion of law as its own.

Based upon the foregoing reasons, IT IS HEREBY ORDERED that:

1. The Litigation and Cost Sharing Agreement (Agreement) entered into by the parties on or about February 14, 2005, controls the allocation of proceeds from the third-party recovery.
2. Pursuant to Idaho Code § 72-718, this decision is final and conclusive as to all

matters adjudicated.

DATED this 3 day of October, 2008.

INDUSTRIAL COMMISSION

/s/ _____
James F. Kile, Chairman

/s/ _____
R.D. Maynard, Commissioner

/s/ _____
Thomas E. Limbaugh, Commissioner

ATTEST:

/s/ _____
Assistant Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the 3 day of October, 2008, a true and correct copy of the foregoing **FINDINGS, CONCLUSION**, and **ORDER** were served by regular United States Mail upon each of the following persons:

D SCOTT SUMMER
PO BOX 1095
CALDWELL ID 83606

ALAN K HULL
PO BOX 7426
BOISE ID 83707-7426

djb /s/ _____